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In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PETITIONER

v.

BETHLEHEM STEEL CORPORATION et al.

Brief for Respondents in Opposition

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Seattle, Washington 98104

FRAYN PRINTING COMPANY

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QUESTIONS PRESENTED

In its pleadings in district court and in its statement of points on appeal in the court of appeals the government repeatedly alleged that TEXMAR sank. (Answer, par. IX, R. 18, 19, 20; Claim, par. VII, R. 24, 25, 26; Statement of Points, par. 1, R. 54). We infer that the government alleged a sinking in order to take advantage of 33 U.S.C. § 409, which makes it a crime to carelessly sink a vessel, and which forms the springboard for petitioner's argument about "statutory duty". Whatever the reason, the court of appeals took the government's allegations at face value:

> "This case presents the question whether a ship owner who by his negligence causes the ship to sink in a channel where it will, until removed, constitute an obstruction to navigation, is liable to the United States for the cost incurred by the United States in

removing the ship from the channel." 319 F. 2d, 513.

We know and the government knows that the TEXMAR did not sink. But we are obliged to take the government's allegations as true—as its attorney swears, R. 41—and petitioner cannot now change the premise of its case, asking this court to review something the courts below were not called upon to consider.

We suggest that the only question here can be the question raised by the pleadings and considered by the court of appeals, as stated above by Judge Madden.

STATUTES AND REGULATION INVOLVED

We do not agree that the Limitation of Vessel Owner's Liability Act is involved in this appeal. Assuming as we must that petitioner's allegations are true, respondents have no right to limit their liability. The question is whether petitioner has any *in personam* claim against respondents for the expense of wreck removal.

STATEMENT

Petitioner made no mention of the fog which was the reason for this accident in the first place. (R. 6, 23).

Petitioner implied that respondents gave something less than a full abandonment of the wreck. (Pet., 3) In fact, Bethlehem, the sole owner of the TEXMAR, abandoned all of its interest in the wreck four days after the accident. (Answer, par. VI, R. 17) Calmer Steamship Corporation, the car-

rier, salvaged what cargo it could for the benefit of the cargo owners, after their representatives refused to do anything. (R. 34-37)

The government made no move to save any cargo. (R. 48)

ARGUMENT

This case concerns the accidental sinking—or, as the government now argues, stranding — of the steamer TEXMAR, a ship outbound from Aberdeen with a full cargo. The ship ran aground in a public channel in Grays Harbor and broke her back. She was then a wreck.

No court in the United States or in England has ever denied a shipowner the right to abandon the wreck in such circumstances.

In a series of no less than six decisions starting with *Loud v. United States*, 286 Fed. 56 (6 Cir. 1923), our Federal courts have consistently held that the Wreck Statute, 33 USC §§ 409, 414, 415, confirms the right to abandon a wreck and that it does not impose any *in personam* liability on the former owner for expenses incurred by the government in removing a wreck from a public channel. As summarized in *The MANHATTAN* (United States v. Atlantic Refining Co.), 10 F. Supp. 45, 49, approved on appeal, 85 F.2d 427, 429 (3 Cir. 1936), cert. denied, sub nom. *United States vs. The BESSEMER*, 300 U.S. 654:

> "... In the absence of any statute and before the enactment of the Wreck Statute, the owner of a sunken vessel always had the

1. Citations and facts in each case are set out in Appendix A

> "right to abandon her and thus entirely absolve himself from liability for damages caused by the obstruction of the channel. See *Winpenny and Chedester v Philadelphia*, 65 Pa. 135. The theory of the law was that if the sunken vessel is a menace to navigation its disposition is a matter of public concern, and that the owner has suffered sufficient loss in the loss of the craft and no further loss will be imposed upon him by way of damages for subsequent accident, provided always that he has abandoned it. *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Company* (D.C.) 17 F.2d 858. . . . "The Wreck Statute, U.S.C. tit. 33, §§ 409, 414, 415 (33 USCA §§ 409, 414, 415), did not materially change the law in this respect."

Congress can at any time change this law. In particular it can impose *in personam* liability upon the former owner for expenses of wreck removal, as is done expressly by English acts and by numerous nineteenth century state statutes and local ordinances.[2] Indeed, our Federal Wreck Statute is almost unique in omitting such provision. But what petitioner asks is a judicial fiat to insert it anyway. *United States v. Zubik*, 295 F.2d 53, 54, 55 (3 Cir. 1961); *United States v. Bethlehem Steel Corp. et al.*, below, 319 F.2d 512, 520 (9 Cir. 1963).

The decision below does not collide with the ruling in *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). Wrecks — accidental obstructions — have always been considered differently than purprestures and other volitional obstructions to navigation. Our Wreck Statute evolved from legislation wholly disassociated from Sec. 403, upon which

[2] Typical statutes and ordinance are set out in Appendix B

petitioner relies. Indeed, if a wreck is an "obstruction" within the ambit of Sec. 403, as suggested by Judge Browning, what is the point to the Wreck Statute? Talk about negligence is meaningless, because Sec. 403 is said to prohibit "anything, whatever done or however done *** which tends to destroy the navigable capacity."

Petitioner's argument implies that the Wreck Statute itself is superfluous, whereas the Statute's history gives it cogent meaning which altogether discredits that argument.

The alleged "administrative interpretation" of the Wreck Statute is perhaps best answered in a recent Army publication:

> "The owners of a sunken vessel, of course, have the primary right to remove it. Once abandonment has been established, however, the United States may apply such value as the sunken vessel may have to the payment of the cost of removal. In removing an abandoned sunken vessel from the navigable waters of the United States, the United States is limited in its recovery to the value of the vessel and its cargo. A claim for further reimbursement against the owners may not be made."
>
> Department of the Army pamphlet 27-164, MILITARY RESERVATIONS AND NAVIGABLE WATERS (July 1961), Par. 99. Removal of Sunken Vessels, p. 182.

3. Full text of Par. 99 is set out in Appendix C.

1. The Wreck Statute specifies the owner's right to abandon a wreck, and the government's remedies against the wreck and against those responsible for the wreck

The sense of the Wreck Statute, and of the difference between it and the other parts of the Rivers and Harbors Appropriation Act of 1899, are best gleaned by considering the advances in law and the problems which confronted Congress in the Nineteenth Century.

Starting with a tentative act in 1824, Congress embarked upon an historic program to improve and maintain our rivers and harbors to aid navigation.[4] In 1836 it made a specific appropriation to remove a wreck in the harbor of New Bedford, and thereafter it made other such specific appropriations until a general statute was finally made to cover removal of wrecks, in 1880.

Four things hindered the engineers. First, and foremost, the district engineer had to have an appropriation to spend money upon a particular wreck or upon the particular waterway obstructed by the wreck. See 12 Op. Atty. Gen. 494 (1868), concerning the wreck of the steamship SCOTLAND, and 15 Op. Atty. Gen. 284 (1877), concerning the wreck of the schooner E. F. MEANY.

Second, the district engineer needed some assurance that the wreck was abandoned and that he would not be destroying someone's property. There was no presumption of abandonment, and no prescribed procedure whereby the former owners could give notice of abandonment.

4. Citations to early statutes are set out in Appendix D.

Third, shipping needed protection against wrecks in navigable channels, whether or not they were abandoned. *The SWAN*, 23 Fed. Cas. 495, No. 13,667 (CC, SDNY 1855), had ruled that an innocent owner had no duty to mark the wreck. *Worth v. Steam-tug WM. MURTAGH*, 6 Fed. 192 (EDNY 1881), ruled that the offending ship was not liable to another vessel for failing to raise or mark the vessel it sank.

Fourth, public authorities were balked by salvors who took months and sometimes years trying to salvage a wreck which endangered navigation. For exemple, the steamship "SCOTLAND" was wrecked off Sandy Hook in 1866. Two years later it was still there. Congress appropriated $100,000 to remove it, but private salvors tried to keep possession of the wreck nevertheless. See Appropriation Act of July 25, 1868, 15 Stat. 174, and 12 Op. Atty. Gen. 494 (1868).

The first Federal wreck statute, Sec. 4 of the Rivers and Harbors Appropriation Act of 1880, 21 Stat. 197, gave the War Department power to advertise notice to establish as a matter of law that a sunken wreck was derelict. It made a permanent appropriation for the removal of wrecks from any river, lake, harbor, or bay, or other navigable water of the United States.

This statute was amended by the next Congress (1882) to allow sale of the sunken wreck to the contractor as it lay. 22 Stat. 208.

In 1890 Congress added a provision that wrecks not raised within two months were subject to be broken up or removed by the War Department

without liability for any damage to the owners. 26 Stat. 454, Sec. 8.

The Rivers and Harbors Appropriation Act of 1899, sec. 19, 30 Stat. 1154, consolidated the foregoing acts, casting them in new form and shortening the time for presumptive abandonment to 30 days. At the same time (1899) Congress solved the third and fourth problems above mentioned, by imposing an absolute duty upon the vessel owner to mark his sunken wreck until such time as he either raised it or abandoned it, and by requiring him to proceed immediately with removal if he intended to salvage the wreck. Sec. 15 (now 33 USC § 409).

In summary, the Wreck Statute as now constituted makes it a misdemeanor to voluntarily or carelessly sink a vessel in a navigable channel, and requires the owner of any vessel wrecked and sunk in a navigable channel to mark it immediately and to maintain the marker until the wreck is removed or abandoned. If he intends to salvage he has to start immediately and prosecute such removal diligently; otherwise, the wreck is considered abandoned. 33 USC § 409

Every person and every corporation that violates Sec. 409 is subject to fine or imprisonment. 33 USC § 411.

Any vessel used or employed in violating Sec. 409 is liable for the pecuniary penalties specified in Sec. 411. If sunk and abandoned, the wreck is forfeit if the District Engineer determines to remove it as an obstruction to navigation. 33 USC § 414.

Whether sunk or not, and whether abandoned or not, a vessel which seriously interferes with navigation is subject to immediate seizure and removal or destruction, at the vessel's expense. 33 USC § 415.

The permanent appropriation for expenses of wreck removal is continued in 31 USC § 725a.

2. The general obstruction statute, Sec. 403, was part of a scheme to solve problems other than shipwrecks

The very cases which petitioner cites demonstrate other problems which confronted shipping in the Nineteenth Century—hydraulic mine tailings, rotting hulks, low bridges, damage to improvements already built by the engineers, etc. An indictable nuisance could be enjoined by a State. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884). But there was no correlative "common law of the United States" which prohibited obstructions in navigable waters. *Willamette Iron Bridge Co. v. Hatch*, 125 US 1, 8, 31 L.ed. 629, 632, 8 S.Ct. 811 (1888).

> "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided." *Gilman v. Philadelphia*, 3 Wall. 713, 725 (1866).

Thus it was that in August, 1888, five months after *Willamette Iron Bridge Co.*, Congress passed an act controlling the height, span, and placement of bridges and bridge piers and abutments. Rivers and Harbors Appropriation Act of 1888, 25 Stat.

400, 423, 424, 425. Two years later Congress made it unlawful to cast off stone, earth, rubbish, wreck, or other waste of any kind which might obstruct navigation; made it unlawful to build any wharf, dam, breakwater, or structure of any kind which might obstruct navigation; and, generally, prohibited the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters of the United States. Rivers and Harbors Appropriation Act of 1890, Secs. 6, 7, 10, 26 Stat. 453, 454. Shipwrecks were not considered within the purview of these sections. They were dealt with separately, in Sec. 8, 26 Stat. 454, already mentioned.

The 1899 act, 30 Stat. 1121, 1151-1155, brought all of these general statutes together, in somewhat revised form. The bill was represented to Congress as a codification of existing laws with no essential changes. 32 Cong. Rec. 2297 (Senate), 2923 (House). Significantly, Congress did not merge the Wreck Statute with the "general obstruction statute", and provided different remedies. Compare Sec. 12, now amended and appearing as 33 USC § 406, with Sec. 16, now appearing as 33 USC §§ 411, 412.

Section 403 does not apply to shipwrecks. *United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240, 241 (D. Conn. 1926); *In re Eastern Transportation Co.*, 102 F.Supp. 913, 916 (D. Md. 1952), aff'd sub nom. *Ottenheimer v. Whittaker*, 198 F.2d 289 (4 Cir. 1952); *United States v. Wilson*, 235 F.2d 251, 253 (2 Cir. 1956).

To give "obstructions" proscribed in Sec. 403 such broad sweep that they embrace shipwrecks

dealt with in Sec. 409 might be good rhetorical logic, but it is historical nonsense.

It was for this reason that both the Third Circuit and the Ninth Circuit agreed:

> "*United States v. Republic Steel Corp.*, supra, has no impact upon the issue in the instant case. The questions there presented and decided are entirely unrelated to the problem here involved."

United States v. Zubik, 295 F.2d 53, 58 (3 Cir. 1961); *United States v. Bethlehem Steel Corp.*, below, 319 F.2d, 520.

3. The 1946 regulation was not contemporaneous with the 1899 act, and did not follow preceding construction and court decisions.

Section 209.410 of 33 C.F.R. quoted by petitioner, pp. 49, 50, is an anomoly.

Before dealing with it, however, we should point out that the informal 1901 letter, pet., p. 52, is clearly extraneous. There is nothing to indicate whether the wreck of the CASCADE was abandoned, and whether or not it obstructed a public channel. The legal advice was gratuitous at best.

In 1905 the Judge-Advocate General informed the Secretary of War that an owner had the right to abandon a wreck in a public channel without regard to any question of negligence. Subject: Wreck—SS LOUISIANA of the Southern Pacific Company, C. 18, 824, November 14, 1905.

5. Full text is set out in Appendix F

This latter opinion was confirmed by *United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240 (D. Conn.) in 1926.

In 1931 the House Committee on Rivers and Harbors considered a bill to amend the Rivers and Harbors Act of 1899. Among many other things the amendment would have made it unlawful to abandon any wreck which might in whole or in part float into and upon navigable waters of the United States. The War Department opposed the amendments, with one exception not relevant here. The Hon. Patrick J. Hurley, Secretary of War, wrote to the Chairman of the Committee:

> "The present law is comprehensive and has proven reasonably effective, both as a preventive and remedial measure. During the long period it has been in existence its provisions have been the subject of judicial interpretation and decision, and the public has become acquainted with its requirements and meaning. * * * If legislation creating new offenses or correcting of the abuses is needed to supplement the existing law it should preferably take the form of a separate and independent measure."

Report of Hearings before the House Committee on Rivers and Harbors, 71st Congress, 3d Sess., on H.R. 11512 (1931).

At this point the pertinent reported decisions were *United States v. Bridgeport Towing Line, Inc.*, above-mentioned, and *Loud v. United States*, 286 Fed. 56 (6 Cir. 1923), both confirming that shipowners had a right to abandon wrecks, whether they had been negligent or not, and that the former

6 Full text of letter is set out as Appendix E.

owners had no personal liability to the government for the cost of wreck removal.

The MANHATTAN, 10 F.Supp. 45, affirmed, 85 F.2d 427, cert. denied, 300 U.S. 654, confirmed that interpretation again, in 1936.

Judge Madden correctly stated:

> "The last sentence of the regulation would neatly solve our problem. But what it said was contrary to judicial decisions at the time the regulation was issued [1946], and was, if we are correct in our estimate of what the statutes mean, an unauthorized effort to administratively improve the statute."

United States v. Bethlehem Steel Corp., below, 319 F.2d, 520. We find no instance where this regulation has been enforced or even acknowledged by any court.[7]

4. Other contentions by petitioner are ill-founded

a. Petitioner states that respondents do not deny that their negligence caused the wreck, and that they violated a criminal statute, 33 USC § 409. (Pet., p. 6) We emphatically deny both statements. We are obliged to assume the truth of petitioner's allegations for the purposes of this proceeding.

b. Petitioner suggests that this court invent some Federal common law to supplement the present statutes. (Pet., pp. 13, 14)

As we understand it, common law derives from judicial decisions and customs. John Chipman

7. Even Army pamphlet 27-164, Appendix C, makes no mention of this anamolous regulation

Gray, *The Nature and Sources of the Law*, Chs. IX, XII (Beacon Press Ed., Boston, 1963, pp. 198 et seq., 282 et seq.) So far as judicial decisions are concerned, this Court has on at least three occasions ruled that there is no Federal common law prohibiting obstructions to navigable waters. It is for Congress to determine appropriate regulations and sanctions. *Gilman v. Philadelphia*, 3 Wall. 713, 724, 725 (1866); *Willamette Iron Bridge Co. v. Hatch*, 125 US 1, 8 (1888); *United States v Republic Steel Corp.*, 362 US 482, 486 (1960).

So far as custom goes, the decisions are unanimous: men who suffer the wreck of their ships in public waters have always been entitled to abandon them. *Winpenny v. Philadelphia*, 65 Pa. 135, 138, 139 (1870); *Petition of Highlands Navigation Corporation*, 29 F.2d 37, 38 (2 Cir. 1928).

> "The right of the Crown to remove the obstruction [five hulks in the waters of Halifax Harbor] and charge the owner with the cost is a remedy not existing at common law, and means are provided in the statute to recover the expense, such means being a special and particular remedy."

Attorney-General of Canada v. Brister, [1943] 3 D.L.R. 50, 17 Mar. L.R. 93, 106 (Nova Scotia).

> "The respondents were under no liability to pay these expenses [of wreck removal] at common law. The liability, if it exists, is created by the enactment I have quoted [Aire and Calder Navigation Act, 1889, s.47]."

Barraclough v. Brown, 8 Asp. Mar. Cas. (NS) 290, 291 (HL, 1897, Lord Herschell).

c. Next, cutting off in another direction, petitioner argues that the respondent Bethlehem's right to abandon the wreck of the TEXMAR derives solely from statute—the Limitation of Vessel Owner's Liability Act, 46 USC §§ 181 et seq. (Pet., p. 11)

On its face this Act applies to whole ships and wrecked ships alike. The "abandoning the ship and freight" mentioned in *The SCOTLAND*, 105 US 24, 28 (1881), means the surrender described in General Admiralty Rule 51. It is a foreshortened expression of the term used in Europe, "abandoning the ship and freight to the creditors," as the maximum liability of the shipowner. *Walker v. Boston and Hope Insurance Companies*, 80 Mass. 288, 297 (1859).

Here we are concerned with abandonment of personal property. *Brown on Personal Property*, Sec. 6, pp. 9, 10; *Thompson v. United States*, 62 Ct.Cl. 516, 524, 525 (1926).

The wreck having sunk or stranded on the shore within Grays Harbor County, we are dealing with common law, not maritime law. William Palmer, *The Law of Wreck* (London, 1843), p. 2.

d. Confusing the issue at hand with the right to limitation of liability, petitioner blandly asserts that only "innocent" owners may abandon wrecks and thereby absolve themselves of liability. (Pet., p. 12). Liability to whom?

Not a single case cited by petitioner holds or intimates that the sovereign—the United States government or a state or the Queen of England—is entitled to recover from a former owner the cost of

removing a wreck accidentally lost in public waters. The rights of other vessels, dock owners, and proprietors of British conservancies and canals are measured by tort law, which is not involved in this case.

e. Throughout its argument petitioner equates this wreck with trespass or nuisance, and reasons therefrom that the Government has an extra—statutory cause of action to recover damages or restitution.

There was no trespass. The State of Washington owns the bed of Grays Harbor. State Constitution, Art. 17 Sec. 1, vol. O, RCW p. 80; *Port of Seattle v. Oregon & Washington R. Co.*, 255 US 56, 63 (1921); Submerged Lands Act, 67 Stat. 30, 43 USC Sec. 1311.

A wrecked ship has never been considered a purpresture or an indictable nuisance. See authorities quoted and cited in *Winpenny v. Philadelphia*, 65 Pa. 135, 138, 139 (1870).

The government removes or destroys a wreck when and as it sees fit to carry out its governmental function to make navigation safe, not to perform some private shipowner's duty. *Baltimore, Crisfield & Onancock Line v. United States*, 140 F.2d 230, 233 (4 Cir. 1944). The expense does no benefit to the man who has already lost his ship. Hence the government has no claim to restitution from him. *Loud v. United States*, 286 Fed. 56, 59 (6 Cir. 1923). Petitioner's citation from the *Restatement of Restitution* is inappropos.

f. Petitioner argues that wreck removal is a burden on the public purse. (Pet., p. 15) It cites a pending case, *United States v. 2,220,000 Pounds*

Chlorine Cargo ex Barge Wychem, et al., as a vivid example.

In its brief in that case, the government says that the barge was no obstruction to navigation. The cargo was removed pursuant to the Federal Disaster Act, P. L. 81-875, 64 Stat. 1109 (1950). We fail to see its relevance here.

If indeed wreck removal has become a burden which Congress feels should be shifted to private shipping, as in England, Congress is free to change the rules at any time. But this Court ought not to change the rules to accommodate the Executive's ideas of what fiscal policy should be. *United States v. Standard Oil Co.*, 332 US 301 (1947), is precisely in point:

> "It (the tort law analogy) is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.
>
> "Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours." 332 U.S., 314.

5. Added Ground in Support of Decree

In both courts below we pointed out the peculiar attitude taken by the government when this accident occurred.

Two weeks after the accident the District Engineer simultaneously declared the wreck to be an

obstruction to navigation within the meaning of both Sections 414 and 415 of Title 33, U. S. Code, announced that he was taking action to remove or destroy it as provided by said statutes, and denied Bethlehem the right to abandon it. (Telegram, R. 28)

The District Engineer cannot proceed under both sections at once—they are alternative. Since Bethlehem had already abandoned the wreck, the engineer no doubt had his choice. But we have maintained, and do here maintain, that this cannot be a frivolous choice. If he determined as a fact that the wreck created an emergency requiring summary seizure under Section 415, as stated in his telegram, then the District Engineer proceeded under Section 415, not Section 414. The government's rights in this case are measured by the terms of Section 415, and any question of abandonment is moot.

CONCLUSION

Courts of appeals have agreed in their interpretation of the Wreck Statute over a span of forty years. As long ago as 1931 the Secretary of War concluded that its meaning was settled, and that it had proven reasonably effective, both as a preventive and remedial measure. Historically, wrecks and volitional obstructions have been treated as distinctly different subjects, both by Congress and by the courts; there is no genuine connection between the problem dealt with in *United States* v. *Republic Steel* and the problem dealt with in *United States* v. *Zubik* and in this case.

For these reasons we respectfully submit that the petition should be denied.

M. BAYARD CRUTCHER
Attorney for Respondents
Bogle, Bogle & Gates
Norton Building
Seattle, Washington 98104

November 1963

APPENDIX A

Federal Decisions on Right of Abandonment and Expenses for Wreck Removal

Since 1899 there have been six major decisions by federal courts bearing on the right of abandonment and the question of indemnity to the government for expenses of wreck removal. We cite them in chronological order.

In *LOUD v. UNITED STATES* (6 Cir. 1928) 286 Fed. 56, a power barge collided with an abutment and sank in St. Mary's River. The District Engineer straightened the sunken vessel to clear the channel from this obstruction, upon authority of § 415. The United States claimed for its expenses. The court of appeals rejected the claim.

> "It is equally clear that the owner of a vessel is not personally liable for the expense incurred by the government in removing obstructions to navigation under authority of this section, but, on the contrary, that the claim for such expenses must be asserted directly against the vessel and its cargo. The further claim of the United States government that . . . this money was expended for the use and benefit of the owners . . . is negatived by the uncontradicted evidence that this vessel was a total loss . . ." 286 Fed., 59.

In *UNITED STATES v. BRIDGEPORT TOWING LINE, INC.* (D. Conn. 1926), 15 F.2d 240, defendant was trying to salvage an abandoned barge. By defendant's negligence the barge sank and became an obstruction to navigation. The government sued

to compel defendant to remove it. The court denied an injunction.

> "(The Rivers and Harbors Act, §§ 403, 406) is not applicable to a case of accident or negligence. In other words, when the statute speaks of the 'creation of any obstruction,' what is meant is evidently the consciously directed action to such an end. . . .
>
> ". . . The differentiating circumstance (between *United States v. Hall* (1 Cir. 1894) 63 Fed. 472, and the present case) lies in the fact that the *sinking* of the vessel was not deliberate, was not intended, but was due to an accident which, whether caused by negligence or not, remains nevertheless an accident." 15 F.2d 241.

In *THE MANHATTAN* (*United States v. Atlantic Refining Co.*, E.D. Pa. 1935) 10 F.Supp. 45, respondent's ship BESSEMER collided with the government's dredge MANHATTAN, which sank in the Delaware River. The government raised the dredge and claimed the cost of raising as part of its collision damages. The court rejected that item as an element of collision damages.

> "I fully agree with the Commissioner's conclusion that this is not an item which can be added to the government's recoverable damages. In the absence of any statute and before the enactment of the Wreck Statute, the owner of a sunken vessel always had the right to abandon her and thus entirely absolve himself from liability for damages caused by the obstruction of the channel. See *Winpenny and Chedester v. Philadelphia*, 65 Pa. 135. The theory of the law was that

if the sunken vessel is a menance to navigation its disposition is a matter of public concern, and that the owner has suffered sufficient loss in the loss of the craft and no further loss will be imposed upon him by way of damages for subsequent accident, provided always that he has abandoned it. *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Company* (D.C.) 17 F.2d 858. It follows that since the removal could not have been required of the owner, its cost in no way increased his loss and consequently could not have been charged by him to the wrongdoer.

"The Wreck Statute, U.S.C. tit. 33, §§ 409, 414, 415 (33 USCA §§ 409, 414, 415), did not materially change the law in this respect. Section 415 [409] reaffirms the duty to mark the wreck. It applies to the government as well as private owners. The SNUG HARBOR (*Eastern Transp. Co. v. United States*) 283 Fed. 1015 (D.C.). But we have nothing to do with that section in this case. Section 414 merely reaffirms the law as it stood by which the owner terminates his liability by abandonment (which may consist in doing nothing for thirty days) and the Secretary of War is authorized (but not required) to assume the general governmental duty of clearing the navigable channel. Section 415 provides that he may perform this duty without waiting for abandonment by the owner. The only possible change effected by these statutes is that the government is given either the wreck itself (in case of removal after abandonment) or a lien against it for the amount expended (in case of immediate removal before abandonment).

"Although I think it clear that sections 414 and 415 of the statute were not intended to apply to governmental vessels sunk in

navigable channels, the question is of no moment, because whatever cost falls upon the government in removing any vessel occurs by reason of its general powers, and functions and not by reason of its ownership of the wreck. The burden upon the government is exactly the same whether the vessel sunk is government owned or privately owned, or whether it was sunk by wrongful act or by pure accident.

"So far as I know the right of recoupment against a tort-feasor who causes a sinking has never been asserted by the government in case the wreck was privately owned, and I can find nothing in the statute which creates such a right either in the case of privately owned vessels or of those which are the property of the government. In fact, the rights *in rem* which are conferred would seem to negative that intent. At any rate the statute is silent upon the subject." 10 F.Supp., 49, 50, expressly approved on appeal, 3 Cir. 1936, 85 F.2d 427, 429, cert. denied sub nom. *United States v. THE BESSEMER*, 300 U.S. 654.

In *ZUBIK v. UNITED STATES* (3 Cir. 1951) 190 F.2d 278, libelant bought a sunken wreck. Thereafter the district engineer raised it. Zubik offered to pay the government's expenses in return for the wreck. The district engineer refused, and Zubik sued to recover it. The court dismissed his libel.

"(Section 414) expressly gives (the Secretary of the Army) the discretion to sell the barge and in such case all the proceeds must go into the Treasury. The courts cannot interfere with this discretion given him. It is immaterial that as a matter of hindsight it appears that the government stands to gain

rather than lose by the deal. If the costs of removal exceeded the value of the barge the owner would not be liable for the difference. He cannot conversely, claim the benefits simply because the salvage operations proved financially successful." 190 F.2d, 281.

In *UNITED STATES v. WILSON* (2 Cir. 1956) 235 F.2d 251, the government sued to compel the defendants to remove a sunken barge from the Hudson River. There was evidence that the barge had been deliberately scuttled, but no finding that it was done at the owner's behest or with his knowledge. The court denied an injunction.

> "Clearly, our sunken barge is not a structure prohibited by (§§ 401 and 404) which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in (§ 403). . . . Under (§ 409) it is the duty of the owner of a sunken craft to commence the immediate removal thereof. But failure to remove is 'considered as an abandonment' thereof which is grounds for removal *by the United States* as provided for by (§ 414). And (§ 414) confers powers on the Secretary of War to remove the craft with provision (not to charge the cost of removal to the owner) to forfeit the craft to the contractor employed to accomplish the removal.
>
> "Thus we find nothing in the 1899 Act which justifies an injunction whereby the cost of removal may be saddled upon any of these defendants." 235 F.2d, 253.

Finally, in *UNITED STATES v. ZUBIK* (3 Cir. 1961) 295 F.2d 53, defendant negligently sank two towboats in the Allegheny River, in such manner as to obstruct navigation. The government demanded

that he remove them. He did not, and the district engineer then removed the wreckage and brought action against him alleging that the wreckage was valueless and that the costs of removal went to the unjust enrichment of the defendant.

The government relied upon *United States v. Republic Steel Corp.* (1960) 362 U.S. 482, as "teaching" that the courts must formulate remedies appropriate to effective enforcement of the Rivers and Harbors Act, 1899, and that such remedies are to be fashioned even though they rest on inferences. 295 F.2d, 54.

The court of appeals carefully considered that decision, and found it entirely unrelated to the problem at hand. 58. The court also reviewed the Act itself, and concluded:

> "The sum total of the statutory scheme, excepting its criminal penalty provisions, evidences that the forfeiture right accorded to the Government to remove wrecks obstructing navigable waters is in the nature of an *in rem* right against the removed vessel and not an *in personam* right against the vessel's owner. 295 F.2d, 57.

Lastly, the court of appeals for the 3rd circuit noted that the government's contentions were plainly an effort to achieve judicial legislation.

> "It is the province of Congress and not that of the courts to legislate and where Congress has legislated in a particular field explicitly and with definiteness as it has in the Rivers and Harbors Act for the courts to expand the periphery of the legislative scheme would be judicial trespass." 295 F.2d, 58.

APPENDIX B

COMPARATIVE WRECK STATUTES

English Statutes

British harbors, rivers, and canals are put in the care of local commissioners, undertakers, companies, and the like, each by separate local act. Examples of a few of these acts, concerning wreck removal, are as follows

Dublin Port and Docks Act, 32 & 33 Vict. Chap c. Sec. 96:

> "... the harbourmaster or dockmaster may remove any wreck or other obstruction to the harbour, quays, docks or other approaches to the same; and also any floating timber which impedes the navigation thereof; and **the expense of removing any such wreck**, obstruction or floating timber, **shall be repaid by the owner of the same**, and the harbor-master or dockmaster may detain such wreck, obstruction or floating timber, for securing the expenses" etc.

Manchester Ship Canal Act, 1936, sec. 32

> "(1) Whenever any vessel is sunk, stranded or abandoned in part of — (a) any river canal waterway navigable channel lock or dock forming part of the harbour and port of Manchester or of the undertaking ... the company may if they think fit cause the vessel to be raised or removed ...
>
> "(2) **The company may recover from the owner** of any such vessel **all expenses** incurred by the company under this section in connec-

tion with that vessel . . . as a debt in any court of competent jurisdiction. . . .

"(6) In this connection the word 'owner' in relation to any vessel sunk stranded or abandoned as aforesaid means the owner of that vessel at the time of the sinking standing or abandonment thereof."
(copied from The STONEDALE NO. 1, [1954] 2 All E.R. 170, 173)

These local acts are by no means identical, one to another. *Sheppey Glue & Chemical Works, Ltd. v. Conservators of the River Medway*, 25 Ll. L. Rep. 32, 33.

However, there is a general statute of which these local bodies may take advantage

Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, s. 56:

"The harbour-master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and **the expense of removing any such wreck**, obstruction, floating timber **shall be repaid by the owner** of the same," etc.

State Statutes

Code of Virginia, sec. 2011, as amended by Acts 1889-90, c. 371, p. 624:

"They (the board of harbor commissioners) shall have the authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, . . . **at the expense of the owner** or party causing the obstruction: . . ."

Compare the Laws of Massachusetts, 1883, c. 260, confining *in personam* liability to willful or malicious sinkings.

City Ordinance

Ordinances of the City of New York, art. 8, c. 8, s. 120:

> "In case . . . a vessel shall be stranded, sunken or wrecked and be abandoned for 10 days, the commissioner shall notify the owner . . . and if the owner is not known to the commissioner, or is not within the city, or shall fail to comply with the notice, the commissioner shall cause such obstruction or vessel to be removed, and **the expense of such removal shall be recoverable** by action **from the owner** and shall be a lien on the property or vessel so removed until paid. . . ."
>
> (Copied from *Petition of Highlands Nav. Corporation*, 29 F.2d, 38).

APPENDIX C

Department of the Army pamphlet 27-164, *Military Reservations and Navigable Waters* (July 1961), pp. 181, 182:

"99. REMOVAL OF SUNKEN VESSELS. The Secretary of the Army is authorized, in his discretion, to remove any sunken vessel or similar obstruction that is obstructing or endangering the navigation of any of the navigable waters of the United States. This removal may be ordered either upon abandonment of the vessel by its owners or upon the expiration of more than thirty days, whichever occurs sooner. The removal may be accomplished without liability to the owners of the sunken craft.[42]

"In emergency situations, the Secretary of the Army may order the summary removal of sunken or grounded vessels obstructing the navigation of navigable waters of the United States. The costs of such removals create a lien against the vessel. The vessel may be sold to satisfy the lien if the owners fail or refuse to reimburse the United States for the cost of removal within thirty days after notice.[43]

"These provisions do not invest the Secretary of the Army with exclusive jurisdiction over the removal of obstructions in the navigable waters of the United States. They do, however, clothe him with the discretionary power either to act or to leave the matter in the hands of local authorities. When the

42 Rivers and Harbors Appropriation Act of 1899, sec. 19, 30 Stat. 1151, 33 U.S.C. 414 (1958).

43 Rivers and Harbors Appropriation Act of 1899, sec. 20, 30 Stat. 1151, 33 U.S.C. 415 (1958).

Secretary exercises his discretion and takes charge of a sunken vessel, his jurisdiction is exclusive."

"The owners if a sunken vessel, of course, have the primary right to remove it. Once abandonment has been established, however, the United States may apply such value as the sunken vessel may have to the payment of the cost of removal. In removing an abandoned sunken vessel from the navigable waters of the United States, the United States is limited in its recovery to the value of the vessel and its cargo. A claim for further reimbursement against the owners may not be made.""

44 Hagan v. City of Richmond, 104 Va. 728, 52 S.E. 385 (1905).

45 Dig. Ops. JAG 1912, p. 778.

46 JAG 159.17 November 1933

APPENDIX D

Early Federal Statutes Mentioned

An act to improve the navigation of the Ohio and Mississippi rivers, 4 Stat. 32 (1824), was the beginning step. Two days later Congress appropriated money to deepen the channel leading into the harbor of Presque Isle and to repair Plymouth Beach, 4 Stat. 38 (1824).

In 1826 $50,000 was appropriated to remove obstructions in the river Savannah, below the city of Savannah, 4 Stat. 173.

Other similar appropriations followed at each session of Congress. The Rivers and Harbors appropriation Act of July 4, 1836, 5 Stat. 129, made the first express provision for a wreck:

> "For removing the wreck in the harbor of New Bedford, ten thousand dollars."

The appropriation act of July 25, 1868, 15 Stat. 174, supplied $100,000 to be expended under the direction of the Secretary of War in the removal of the wreck of the iron steamship "Scotland", then on the bar outside of Sandy Hook.

The Rivers and Harbors Act of 1872, 17 Stat. 373, furnished money to remove wrecks in the Chifuncte river, Louisiana, and in Stono river, South Carolina.

An act directing the removal of obstructions from the harbor of the Delaware breakwater, 1880, 21 Stat. 61, appears to be the last such specific appropriation:

> "That the Secretary of War be, and he is hereby, directed to cause to be removed from

the harbor at the Delaware Breakwater and the entrance thereto and in the main ship channel of the Delaware Bay and River several vessels which were sunk in the year eighteen hundred and seventy-seven, and now forming obstructions endangering the safety of vessels entering said harbor after reasonable notice to the owners of such vessels to remove the same, and the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated for that purpose out of any money in the Treasury not otherwise appropriated."

APPENDIX E

From Report of Hearings before the House Committee on Rivers and Harbors, 71st Congress, 3rd Sess., on H.R. 11512, p. 24

WAR DEPARTMENT
Washington, February 12, 1931.

HON. S. WALLACE DEMPSEY,
Chairman Committee on Rivers and Harbors,
House of Representatives, Washington, D.C.

Dear Mr. Dempsey: Reference is made to your letter of January 31, 1931, inclosing a copy of bill H.R. 11512, with request for the views of this department as to the advisability of enacting all or any of its provisions.

The purpose of the bill is to amend the provisions of the Rivers and Harbors Act of March 3, 1899, relating to the protection of navigable waters. It is proposed:

1. To reduce the minimum penalty prescribed by the act for violation of its provisions from $500 to $250.

2. To change the phraseology and enlarge the scope of certain sections of the act.

The act of 1899 makes violations of its provisions a misdemeanor punishable by a fine of not exceeding $2,500 nor less than $500. To properly protect navigable waters from obstructions it is often necessary to institute prosecutions for minor infractions of the law. In such cases experience has shown that juries are reluctant to convict as they feel that

the statutory penalty is out of proportion to the gravity of the offense. It is not improbable that a lesser penalty would conduce to a more effective enforcement of the law. No objection is seen, therefore, to the enactment of the proposed amendment reducing the minimum penalty from $500 to $250.

The department, however, is not prepared to sanction the other amendments proposed in the bill. The present law is comprehensive and has proven reasonably effective, both as a preventive and remedial measure. During the long period it has been in existence its provisions have been the subject of judicial interpretation and decision, and the public has become acquainted with its requirements and meaning. Amendments to a statute of long standing, established validity and settled interpretation, changing its phraseology and enlarging its scope to include things of doubtful pertinency, may lead to confusion and impair the force of the statute. They should not be adopted until the fullest investigation has demonstrated their desirability. If legislation creating new offenses or correcting of the abuses is needed to supplement the existing law it should preferably take the form of a separate and independent measure.

After careful consideration of the statements of the proponents and advocates of the proposed amendments, this department is not convinced that it would be wise or expedient to enact any of the provisions of the bill except those relating to reduction of penalty.

Sincerely yours,

PATRICK J. HURLEY
Secretary of War

APPENDIX F

Opinion of Judge-Advocate General Concerning Wreck of the S. S. "Louisiana."

(18824) C.

WAR DEPARTMENT,
Office of the Judge-Advocate General
Washington

November 14, 1905

To the
Secretary of War.

Sir:

These papers relate to the wreck of the S. S. "Louisiana," owned by the Southern Pacific Railroad Co., which sank at the wharves of that company at New Orleans, Louisiana, and slid out some distance into the stream where it stuck, so that, in its present position, it is alleged to be a menace to navigation.

It appears that both the railway company and the insurer of the vessel have abandoned the wreck as a total loss; and application is made by the railway company for the removal of the same under the Act of March 3, 1899 (30 Stats. 1154). There is submitted with the application a copy of an instrument by which the Southern Pacific Company "for itself as well as on behalf of its underwriters, to whom any interest in the same have passed," states that it "formally abandons to the United States the wreck of said steamer, and consents that the United States Engineers remove the same from where she now lies, under the procedure taken by the United States in similar cases."

In passing it may be noted that while the con-

pany thus formally abandons the vessel to the United States for removal, under the statute which would give the Government the property therein, it appears from these papers that neither the company nor the underwriters would relinquish their claim to the vessel to a private firm—(the Jahncke Navigation and Improvement Company) which offered to remove the wreck without compensation other than that it should become the property of the firm.

It is claimed by the railway company that the wreck is a menace to navigation so that it becomes the duty of the Secretary of War to have it removed; while the local engineer officer (Captain J. F. McIndoe), in accompanying report dated October 31, 1905, says:

> "The Superintendent of the Board of Commissioners of the Port of New Orleans states that no river steamboats are permitted to land in that vicinity below Conti Street (see blue print, accompanying my report of June 1, 1905), a distance of over a quarter of a mile along the wharf front from the foremast of the wreck.
>
> "Considering the width and great depth of the river and the general configuration of the wharf line between Canal and St. Ann Streets, it is reasonable to believe that a steamboat can be handled without danger of colliding with the wreck, which lies over a quarter of a mile below the landing and so near the wharf line. As a matter of fact steamboats making or departing from the landing referred to would habitually be near the middle of the river when opposite the position of the wreck, even if the wreck were not there. There are many places in the Mississippi River where steamboats in leav-

ing landings have a much shorter distance to get straightened out in, in order to avoid bars and snags, and where the current is stronger than in New Orleans Harbor.

"The only accident due to the wreck is that of the steamboat J. E. TRUDEAU which occurred April 10, 1905, three days after the sinking of the 'Louisiana.'

Examination of the document 'Protest Extended' develops the fact that this boat had successfully left her landing and was proceeding up the river when she became unmanageable and was carried by wind and current against the wreck and damaged. This does not prove that the wreck is a menace to navigation for had the 'Trudeau' not struck the 'Louisiana,' she would probably have struck the wharf and might have been more seriously damaged or even sunk.

"Relative to the statements in Memorandum as to 'striking an old wreck' and as to the 'Louisiana' being 'directly in the fairway of the river,' I would respectfully invite reference to my report dated June 1, 1905.

"Nothing has developed to cause me to alter the opinion expressed in my reports of April 20, April 22, May 3 and June 1, 1905, viz: that the wreck of the 'Louisiana' does not obstruct or endanger the general navigation of the Mississippi River and that it is a menace only to vessels arriving at and departing from the Southern Pacific wharves at St. Ann street and adjacent wharves. It is my fixed opinion that this wreck can not be considered such an obstruction as is contemplated by the law for removal of wrecks by the United States. It is an obstruction to the wharves of the Southern Pacific Co. and all work in connection with its removal

should be done without any expense to the United States."

These views are concurred in by Colonel Sears, the Division Engineer, and by the Chief of Engineers, U. S. Army, who expresses the opinion that the wreck is not one which it is the duty of the Department to remove; but that "as it is chiefly an obstruction to the approach to the wharves of the Southern Pacific Company, it would seem that, if its removal is required at all, the expense thereof should be borne by the said company."

Under these facts the opinion of this office is desired: first, as to whose duty it is to clear this waterway; and, second, whether we can hold the railway company or the underwriters for the same, or whether the Government will have to do it.

In regard to the first question, it is to be observed that in the opinion of the Engineer Department the wreck is not a menace to general navigation for the reasons stated above; but is an obstruction to the approach to the wharves of the railway company that owned the vessel; and further that the position of the wreck appears to be such that it does not even preclude access to the wharves of the railway company, although it requires greater care in the use of the same. I concur in the views of the Chief of Engineers that if is not incumbent upon the War Department to cause every sunken vessel to be removed; but that the wreck must be in some navigable channel where it would, to use the language of the statute, "stop, seriously interfere with, or specially endanger navigation." The determination of this matter is committed by the statute to the "Secretary of War, or any agent of the United States to whom the Secretary may delegate proper

authority." It follows, therefore, that if the Secretary of War, in the light of the views expressed by the Engineer Department, should be of opinion that the wreck is not such a menace to navigation as the statute contemplates, he is under no duty to take any steps regarding its removal.

The second question is as to whether the railway company or the underwriter can be required to remove the wreck; in other words, whether either party is under a legal duty which can be enforced by or at the instance of the War Department. In my opinion the statute does not impose such a duty upon the owner or underwriter of the vessel. So long as the vessel is not abandoned, it makes it the duty of the owner to use due precaution to mark its location, to prevent it being a menace to navigation; but it recognizes the right to abandon the wreck without further liability on account of the same. In the event of such abandonment the wreck, if such a menace to navigation as the statute contemplates, should be removed under the provisions of the statute.

Under the facts, as they appear from these papers, I am of opinion that the Secretary of War may properly determine that the wreck is not such a on as it is incumbent upon the Department to remove under the statute in question; so that, if its removal is required in the interest of the applicant, the expense thereof should be borne by it.

Very respectfully,

GEO. B. DAVIS,

Judge-Advocate General.

Nov. 15, 1905